No. 12,353

IN THE

United States Court of Appeals

For the Ninth Circuit

HECTOR AITCHISON and
DORIS AITCHISON,
Appellants,

vs.

H. G. ANDERSON,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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STATEMENT OF CASE.

Facts.

The above-entitled cause, which was a suit to dissolve a partnership and for an accounting, came on for trial on the merits before the Honorable Harry E. Pratt, District Judge for the Territory of Alaska, Fourth Judicial Division, at Fairbanks, Alaska, sitting without a jury. On the trial of said cause, the appellee above named was the plaintiff and the appellants above named were the defendants.

On or about the 13th day of June, 1947, the appellee purchased of the appellants an undivided one-half interest in the business of the appellants conducted in Fairbanks, Alaska, known as The Value Shop and

Liquor Store, for the sum of $7,500.00, upon the representation of the appellants that the said sum of money represented one-half of the value thereof. Thereafter the appellee and the appellants entered into an oral contract of partnership, agreeing to conduct in Fairbanks, the business of merchandising liquor, clothing and sundry merchandise at retail under the firm name of The Value Shop and Liquor Store, one-half of the property and profits subject to one-half of the loss, to be appellee's, and the remaining one-half of the profits, subject to one-half of the loss, to be the joint property of the appellants. It was further agreed that the appellants have the entire management and control of said business, and devote their entire time and attention thereto, and as a consideration of said service, they were to draw a salary of $500.00 per month, to be an expense in computing profits as between the partners. No term for this partnership was agreed upon. At all times between the 13th day of June, 1947, and the 1st day of September, 1948, both days included, all of the properties of said partnership had been in the exclusive control of the appellants. That from the 13th day of June, 1947, to the 1st day of September, 1948, the books and records of said partnership show sales of $110,082.92 and show a loss of $3,738.48 over said period of time. A shortage of between five and eight thousand dollars in the inventory of liquor appeared in the records of the co-partnership, on or about the 17th or 18th days of October, 1947, and that said shortage appeared to be traceable to the appellants. That the parties to this action all

agreed that if the appellee would waive his claim against the appellants for the shortage, that appellee, in turn, should be given credit on the books of the partnership to his capital account for a capital asset of $2,500.00 and that a similar amount should be deducted from the appellants' capital account.

The written lease on the premises where the business was conducted expired the 1st day of June, 1948, and was never renewed. This lease had no renewal clause in it at all and simply expired at the end of the time provided for in the said lease. It was contended by the appellants that this lease had been renewed by an oral agreement which was never reduced to writing and the lease was given a value of $3,834.48 in a statement prepared by Boulet and Kohler, which was an erroneous valuation since the lease had expired and had never been renewed.

Subsequently, a contract in writing was made and entered into between the appellee and the appellants in which it was agreed that the appellee would purchase the interest of the appellants at the book value, plus $1,000.00. There was no special agreement between the parties as to what book value should mean and therefore the usual interpretation should be given to the meaning of the words "book value" which is that book value is the net value of the interest or the true net value. The book value which the appellants placed upon their interest was based upon the landed cost of the merchandise and not the actual market value of the property.

The appellee was not the party in fault in this case and should, therefore, be entitled to wind up the partnership business as provided by law.

After hearing all of the testimony and the evidence produced at the trial, and after hearing the arguments of counsel, the trial Court found for the appellee and entered findings of fact and conclusions of law therein. Subsequently, objections and exceptions to the said findings of fact and conclusions of law were filed by the appellants. These objections and exceptions were overruled after argument. Thereafter a motion for new trial was filed by the appellants, which motion for new trial came on for hearing and was denied by the trial Court, and thereupon, the said trial Court entered a judgment in accordance with the findings of fact and conclusions of law, and decreed that the appellants, and each of them, by their wrongful acts, caused a dissolution of the co-partnership firm and that said dissolution was caused solely by the fault of the appellants and that the appellee was not at fault in any way; and that the appellee was entitled to wind up the affairs of the co-partnership firm without the interference from the appellants; and that the appellants, and each of them, had breached the terms of the written contract between the parties and therefore were not entitled to any benefits therefrom; that the appellee was entitled to a credit on his capital account of $2,500.00 and that the appellants should be charged a like sum; that the written lease had expired and that there was no lawful or enforceable lease on the premises by reason thereof, and that no value of leasehold

improvements was entitled to consideration in the windup of the affairs of the partnership business; that the book value mentioned in the agreement of September 2, 1948, was declared to be the actual value of the assets and that the contract itself, by reason of having been breached, was of no effect, and that the appellee have and recover $500.00 for his attorney's fees and his costs in the sum of $102.00.

It is this judgment upon which this appeal is taken.

ARGUMENT.

The first point upon which the appellants have relied for reversal of the judgment of the District Court for the Territory of Alaska, Fourth Division, is without foundation in fact or in law. The appellants contend that the Court erred in decreeing that the appellants, and each of them, had breached the terms of the written contract between the parties which was entered into on the 2nd day of September, 1948, and that by reason of said breach, are not entitled to the benefits therefrom. The appellants go so far as to set forth the agreement in its entirety in their brief.

A careful reading of the agreement discloses that no special meaning was to be given to the words "book value" except the generally accepted meaning of these words. The trial Court found that there was no special agreement between the parties as to what book value should mean and that therefore the usual interpretation was to be taken, which is that book value

means net value of the interest, and the true net value. The trial Court also found that this value was to be based upon true and correct books and not upon erroneous or false books, or entries, and in this case the books should have shown the entry in regard to the capital accounts of the partners and should not have shown any asset as to the lease on the premises and should have taken the market value of the actual property and not the landed cost value, by reason of which the appellants had failed to prove the contract which they have set forth in their brief.

In Volume 11, C.J.S., page 521, book value is defined thus: "The term implies the existence of books as the basis of computation of the items and figures therein from which the book value is derived, and also a computation that is based upon all the books. In connection with a going business, * * * the phrase has been defined as meaning the actual cost of the stock of merchandise and accounts on hand *less* such depreciation as has actually accrued;" (italics ours) also "the value ascertained by deducting from the assets, carried on the books, the liabilities and other matters required to be deducted."

Corbett v. McClintic-Marshall Corp. (Del.), 151 A. 218, 222;
Elhard v. Rott (N.D.), 162 N.W. 302;
People v. Coleman (N.Y.), 14 N.E. 431, 433;
Cabble v. Cabble, 97 N.Y.S. 773, 775, 111 App. Div. 426, 429.

In *Mills v. Rich* (Mich.), 229 N.W. 462, the Court said at page 463:

"The book value of a business is based upon the actual cost to the defendant of the stock of merchandise and accounts on hand less such depreciation as has actually accrued. * * * Ordinarily a stock of merchandise is worth what it will fetch in the open market."

Gurley v. Woodbury (N.C.), 97 S.E. 754, 756; *Jenneman v. Bucher* (Mo.), 171 S.W. 613, 615.

In *Lane v. Barnard,* 173 N.Y.S. 714, 716, 185 App. Div. 754, it was held that

"Book value means the value of the stock as shown by the assets and liabilities as carried on the books."

In *State v. Lintner* (Kans.), 41 Pac. (2d) 1036, 1038, it was held

"Book value is the net worth of all assets less all liabilities."

In *Southwestern Light and Power Company v. Oklahoma Tax Commission* (Okla.), 62 Pac. (2d) 637, 640, it was held

"Book value means the market value of assets less liabilities."

In *Wineinger v. Kay* (Texas), 58 S.W. (2d) 876, 877, it was held

"*Book value does not mean any arbitrary or fictitious value that may be entered on the books of the company, but the value as predicated on the market value of the assets of the company, after deducting its liabilities.*" (Italics ours.)

It is difficult to understand how the appellants argue that the Court erred in its ruling on the definition of book value in view of the foregoing authorities. They are clear and conclusive and certainly fully substantiate the finding of the trial Court.

The appellants argue on pages 4 and 5 of their brief that immediately upon the execution of the contract, possession of the property was delivered to the appellee and that the appellants had nothing further to do with the business after that. This fact does not relieve the appellants from their full responsibility in complying with the terms of the agreement which was to sell the property to the appellee on the basis of $1,000.00, plus book value, and as has been pointed out above, this book value means the actual value of the property and not some arbitrary or fictitious value, fixed by Boulet and Kohler or anyone else, on the books. After being in exclusive and full control of the business from June 13, 1947, to September 1, 1948, during which time the business lost money, the appellants probably were glad to try to unload it on the appellee at inflated prices, and when they did not succeed in this scheme, they suddenly attempted to rely solely upon their alleged contract dated September 2, 1948. All of the evidence substantiates and supports the trial Court's ruling that the appellants had themselves violated their own contract and that therefore they should not be permitted to rely upon its provisions.

The Court did not err in decreeing that the book value, mentioned in the agreement of September 2,

1948, between the parties, was the actual value of the assets of the co-partnership business, or that the appellants breached the contract by having Boulet and Kohler establish book value as actual value, or that the contract is of no effect, because the law contained in the cases cited above amply supports the rule that book value means actual value; and that Boulet and Kohler did not use actual value in computing the book value, because Mr. Boulet of that firm testified that the basis used by them in arriving at the book value was *the landed cost of the merchandise* (italics ours), and that the landed cost figure was given to Boulet and Kohler by the appellants who had priced the inventory, and that the landed cost was the only basis used by them in arriving at the book value. (T.R. Volume one, page 104.) As a matter of fact, the evidence clearly discloses that a great deal of the goods listed in the inventory was old, obsolete and shopworn, and instead of being worth $10,830.16 as fixed by the firm of Boulet and Kohler on the basis of landed cost, the said dry goods had a true value, as shown by the testimony of Leo E. Morse, of $5,197.59. A similar situation existed in connection with the liquor inventory. Many items thereon were poor selling, unmarketable items which the partnership had been forced to purchase in order to get more popular brands of liquor, and that therefore, valuing these items on the basis of landed cost instead of actual market value would have been a very serious imposition on the appellee, to say the least.

From June 13, 1947, to September 1, 1948, the business was under the full and exclusive control of the ap-

pellants and there is nothing to show that the appellee had any particular knowledge of how the book value was shown by the books of Boulet and Kohler, and it would make no difference as to the law applicable to this case whether the appellee had such knowledge or not, because the law is well settled that book value does not mean any arbitrary or fictitious value that may be entered on the books of the company, but the value as predicated on the market value of the assets of the company. *Wineinger v. Kay,* supra.

The appellee, upon learning of the method by which the appellants sought to arrive at book value, immediately disputed it as was testified by Mr. Boulet. (T.R. Volume one, page 87.)

The appellants seek to substantiate their point by referring to appellee's Exhibit "R" as being a letter wherein the attorney for the appellee recognized the agreement to sell as binding. As is clear from the testimony and from the exhibit itself, the contract was recognized only on the basis of correct book value, including an adjustment in the capital accounts made necessary by reason of the shortage in the liquor inventory and since the offer of the appellee was rejected, as they point out in their brief, they cannot now be heard to argue that the agreement was good, and still fail to live up to any part of its provisions themselves. The appellants point out in their brief that this question was clearly presented to the trial Court in objections and exceptions to the Court's findings and that it was also called to the trial Court's attention in the motion for new trial; however, they fail to point

out that the objections and exceptions were properly argued before the trial Court, as was the motion for new trial, and the trial Court properly overruled the objections and exceptions to the findings and properly denied the motion for new trial.

Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judging of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, the finding of the trial Court is persuasive and presumptively correct.

Presidio Min. Co. v. Overton (C.C.A. 9), 270 F. 388, 390;

Pacific American Fisheries v. Hoff (C.C.A. 9), 291 F. 306, 308.

Findings of fact made by the trial Court will be accorded great weight, and the Appellate Court will not usually disturb them, unless they are clearly erroneous, or there is a preponderance of evidence against them.

Idaho Min. & Mill. Co. v. Davis (C.C.A. 9), 123 F. 396, 397;

Columbia Graphophone Co. v. Searchlight Horn Co. (C.C.A. 9), 236 F. 135;

Vineyard L. & S. Co. et al. v. Twin Falls Oakley L. & W. Co. (C.C.A. 9), 245 F. 30, 33.

The findings of the trial Court, based on evidence taken in open Court, will not be reviewed by an Appellate Court, except for plain or obvious error.

Graff v. Town of Seward, Alaska (C.C.A. 9), 20 F. (2d) 816.

The findings of the trial Court in a suit in equity are presumptively correct and will not be disturbed unless a serious mistake of fact appears; and where there is substantial evidence to support the finding of the trial Court, it is immaterial that the Appellate Court might differ with the process of reasoning employed to reach the finding.

Sherman et al. v. Bramham et ux. (C.C.A. 4), 78 F. (2d) 443.

The findings of the trial Court, in a suit in equity, based on conflicting testimony, taken in open Court, will not be disturbed on appeal.

Clements v. Coppin (C.C.A. 9), 61 F. (2d) 552, 557;

McCullough v. Penn Mutual Life Ins. Co. of Phila. (C.C.A. 9), 62 F. (2d) 831;

U. S., etc. v. McGowan (C.C.A. 9), 62 F. (2d) 955;

Collins et al. v. Finley (C.C.A. 9), 65 F. (2d) 625, 626.

In view of the foregoing authorities, it seems clear that the trial Court did not err in decreeing that the appellee was entitled to have and receive a credit to his capital account of $2,500.00 and that the appellants be charged with the said sum of $2,500.00 The testimony seems conclusive that there was a shortage in the liquor inventory of approximately seven to eight thousand dollars. Neither of the appellants was able to explain this shortgage nor did either of the appellants deny that such a shortage existed; and yet the shortage came about during the time when the appellants had

the full and complete authority over the business and during the time when they were in full and exclusive possession and control of the business, namely, between June 13, 1947 and September 1, 1948. In fact, Mr. Hector Aitchison, one of the appellants, testified as follows on cross-examination:

"Q. Mr. Aitchison, you say that Mr. Orsini and Mr. Anderson claimed there was some discrepancy in the inventory of liquor there?

A. Yes.

Q. I believe you stated that you coudn't explain it to them, how it happened?

A. That is right." (T.R. Volume two, page 386.)

"Q. Well, why didn't you explain to them the discrepancy of approximately $7,000.00?

A. I am not a bookkeeper and I couldn't." (T.R. Volume two, page 387.)

All of the testimony of the other witnesses who were present when the discussion concerning the liquor shortgage was had likewise testified that the appellants did not deny the shortage and yet they could not explain it, and that the appellants positively agreed to the adjustment in capital accounts between the appellee and appellants. Inasmuch as the contract of September 2, 1948, had been violated by the appellants and therefore could not be binding on the appellee, it was perfectly proper for the parties to discuss all of the transactions and dealings had in the partnership business from the 13th day of June, 1947, down to the date of the contract, and whether or not the appellee knew that the transfer of $2,500.00 from

appellants' capital account to his had not been made when the contract was signed is of no consequence, because the parties had agreed to this transfer on October 17th or 18th, of 1947, and that it was merely a matter of having the bookkeepers make the entry on the company ledger.

The trial Court did not err in decreeing that the written lease existing between the co-partnership firm and the Mike Stepovich Estate had never been renewed and therefore was of no value as an asset of the co-partnership firm. The evidence clearly discloses that the old lease, appellee's Exhibit "T", had no renewal clause in it at all, and that it had simply expired at the end of the term provided for in said lease. There was certain testimony concerning an oral agreement and conversation between the appellants and Mike Stepovich, Esq., concerning the properties involved; however, this understanding or arrangement for a two-year lease with the option to renew for two years, was entirely verbal and no memorandum thereof or anything else was ever reduced to writing. Consequently the matter falls within the provisions of the statute of frauds for the Territory of Alaska, Volume 3, Alaska Compiled Laws Annotated, 1949, page 2039 and 2040, Sec. 58-2-2, paragraph 5, "An agreement for leasing for a longer period than one year * * *" In view of this section of the statute, it seems clear that the matter concerning the lease falls within the provisions of the Alaska Territorial statute of frauds. Mr. Boulet testified concerning the lease and said, "However, verbal lease has been given for two years." (T.R.

Volume one, page 87.) Nowhere in the transcript is there any testimony showing anything to the contrary with reference to the lease and therefore it must be held to come within the statute of frauds, and the oral agreement to lease for two years, with an option to renew, is wholly void and of no force or effect. Consequently, the appellants wrongfully caused the bookkeepers, Boulet and Kohler, in making up the book value of the assets of said co-partnership firm, to value an alleged leasehold interest of the partnership in the premises, or on the business which was being conducted, as being of the value of $3,834.48, whereas the co-partnership firm had no lease whatever but was merely holding on a month to month tenancy or under an oral promise of a two-year lease which is invalid under the statute of frauds of Alaska, supra.

The matters and things set forth in the affidavit of Doris Aitchison supporting the motion for new trial are entirely outside the issues of this case, since they occurred long after the suit was started and judgment entered therein, and were not part of the issues joined herein. As a matter of fact, the lease referred to by Doris Aitchison in her affidavit was between entirely different parties from those contained in the lease formerly held by the partnership. The lessee in the lease mentioned in said affidavit was Heber G. Anderson, liquidating partner, and said lease was obtained by the said liquidating partner long after the original partnership had been dissolved and the judgment entered authorizing the said Heber G. Anderson to liquidate the former partnership business.

It is difficult to understand by what process of reasoning the appellants argue that they should have judgment against the appellee for the sum of $4,309.29, together with a reasonable attorney's fee in the sum of $500.00 and their costs and disbursements in the trial Court and their costs and disbursements in the Appellate Court. There is no testimony whatever to support any such contention and all of the testimony is to the contrary and supports the theory that the judgment for the appellee rendered in the trial Court should be affirmed.

In actions which are tried before a Court, without a jury, the trial Court is entitled to consider all the evidence and to draw therefrom such inferences as are reasonable and proper under the circumstances, even though another inference, equally reasonable, might also be drawn therefrom. The weight of inferences and of the explanation offered to meet them, is for the determination of the Court, when it is the trier of the facts.

53 *Am. Jur.* 780;

Main Realty Co. v. Blackstone Valley Gas & E. Co. (R.I.), 193 A. 879, 112 A.L.R. 744;

Glowacki v. Northwestern Ohio R. & Power Company (Ohio), 157 N.E. 21, 53 A.L.R. 1486.

The trial judge, in a trial to the Court without a jury, performs a dual function: he must adopt rules of law for his guidance and find the facts as guided by those rules. He is likewise the judge of the credibility to be given to witnesses who appear before

him, and he is not required to accept the testimony of any witness, which he may deem unreliable, although it may be uncontradicted.

53 *Am. Jur.* 780;

Bianchi v. Denholm & McK. Co. (Mass.), 19 N.E. (2d) 697, 121 A.L.R. 460;

58 *Am. Jur.* 491;

Bates v. American Mortgage Co. (S.C.), 16 S.E. 883, 21 L.R.A. 340.

Testimony may be unimpeached by any direct evidence to the contrary and yet be so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in evidence, or so contradictory within itself, as to be subject to rejection by the Court as a trier of the facts.

58 *Am. Jur.* 493;

Catlett v. Chestnut (Fla.), 146 So. 241, 91 A.L.R. 212;

People v. Strause (Ill.), 125 N.E. 339, 22 A.L.R. 235;

Ironside v. Ironside (Okla.), 108 P. (2d) 157, 134 A.L.R. 621;

Burke v. Kennedy (Pa.), 133 A. 508.

CONCLUSION.

The appellee respectfully submits that the whole argument of the appellants is a fantastic and futile attempt to maintain a position which is entirely without foundation in law or in fact, and that by reason there-

of, the judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, entered in this cause should be affirmed.

Dated, Fairbanks, Alaska,
April 3, 1950.

Respectfully submitted,
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Of Counsel for Appellee.